No. 4859.

IN THE

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

21

Graver Corporation, a corporation,
Plaintiff in Error,
vs.
Hercules Gasoline Company, a corporation,
Defendant in Error.

OPENING BRIEF OF PLAINTIFF IN ERROR.

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This case comes up upon writ of error in an action at law tried before Hon. Edward J. Henning, in which judgment was given for the plaintiff for fifteen thousand dollars ($15,000.00) as damages for alleged breach of contract.

The complaint sets out that defendant Graver Corporation of East Chicago agreed, upon production of certain evidence of title to an oil tank known as "Getty Tank No. 2," to ship certain steel products to the order of plaintiff Hercules Gasoline Company of Los Angeles in the aggregate value of thirty-six thousand dollars ($36,000.00), and agreed to accept as part payment

the aforementioned Tank No. 2 at an agreed price of twenty-seven thousand dollars ($27,000.00). The complaint goes on to allege that defendant refused to furnish steel products upon these terms or to accept Tank No. 2 at the agreed price of twenty-seven thousand dollars. Judge Henning found that the tank was only worth twelve thousand dollars, and decreed that Graver Corporation, the defendant, ought to pay the difference to the disappointed Hercules between the fancy value they put upon the tank for trading purposes and its real value.

The case turns mainly upon the question whether defendant ever made such a contract, and the main points raised have to do with the admission by the trial court of evidence offered for the purpose of charging the defendant with the acts of one Holland, who was said to be agent for the defendant.

The Court Erred in Not Sustaining the Demurrer of the Defendant Below to the Complaint.

We invite the court's attention to paragraph II of the complaint [Tr. p. 6], wherein plaintiff alleges a certain agreement in writing. Under the California practice this agreement may be stated *in haec verba* or according to its effect. The pleading sets out no agreement of plaintiff to do anything. There is no allegation that plaintiff agreed to order or purchase any goods unless this may be inferred from the loose reference to "steel products to be ordered by plaintiff." Defendant agreed to ship promptly as directed, and not later than August first, certain steel products, but there is no allegation

that plaintiff by the contract bound itself to order anything at any time or to produce any evidence of title.

Passing on, now, to the next paragraph of the complaint, we find no allegation of production of evidence of title to Tank No. 2, which is alleged as the basis of the contract.

The plaintiff says in this regard: "Despite the fact that plaintiff had theretofore produced due evidence of its having acquired title to said Graver Tank No. 2." This is not an allegation of production of title. It is a mere recital. There is no allegation, in other words, that there was any such "fact."

The salutary rule of the common law is still in force and requires that a pleading be definite, certain, and perspicuous. It is not sufficient to allege matters by way of innuendo or recital, but there must be such direct and positive allegations as would support a prosecution of perjury.

People v. Jones, 123 Cal. 299.

> "There was no direct allegation that Jones was the agent, or acted as the agent, of the Kamplings, but such agency is alleged by way of recital only, if alleged at all. If it was material to Long's complaint that he should clearly allege that Jones was the agent of the Kamplings, and as such agent negotiated the transfer alleged, the complaint, so far as set out in the indictment, failed to do so, and of course the indictment which recites the allegations of the complaint, also failed in that particular. There was, therefore, no material issue tendered as to Jones' agency. Direct and positive averments of the fact cannot be supplied by any intendment or implication,

and where stated argumentatively or by way of recital or inference it is insufficient. (People v. Dunlap, 113 Cal. 72.) This rule applies even to civil actions. (Denver v. Burton, 28 Cal. 549; Stringer v. Davis, 30 Cal. 318.)"

McCaughney v. Schutte, 117 Cal. 223.

"The complaint here is argumentative, that is to say, the affirmative existence of the ultimate fact is left to inference or argument. Such pleading was bad at common law and is none the less so under our code system. To uphold such a pleading is to encourage prolixity and a wide departure from that definiteness, certainty and perspicuity which it is one of the paramount objects sought to be enforced by the code system of pleading, and that, too, with no resultant effect except to encumber the record with verbiage and enhance the cost of litigation."

Burkett v. Griffith, 90 Cal. 532.

"Argumentative pleading is no more permissible under the code than it was under the common law. Matters of substance must be alleged in direct terms and not by way of recital or reference."

We submit that the general demurrer should have been sustained for lack of any allegation that plaintiff ever produced evidence of title to Graver Tank No. 2 or that plaintiff was ready or willing to perform any terms or conditions of its agreement, these matters being referred to only in recital.

We submit, also, that the complaint is fatally defective as against special demurrer in failure to allege any facts upon which substantial damages could be predicated. Assuming for the moment that the contract and breach

had been sufficiently alleged, there is nothing upon which to predicate more than nominal damages. Our special demurrer should have been sustained.

Philip v. Durkee, 108 Cal. 300.

This is an action for damages for breach of contract to purchase certain iron work. It was alleged that defendant refused to accept delivery and that by reason thereof plaintiff had suffered damages. The court said (p. 302):

> "The demurrer was not only upon the general ground of insufficiency of facts, but also for uncertainty, charging that it is uncertain upon what grounds plaintiff seeks to recover in this action, and in what the alleged damages consist of, or in what manner plaintiff has been damaged, or as to what is the value of said gates, lamps and material. The complaint, treated as in an action for the price of the goods, is insufficient, because there is no averment of delivery or offer to deliver sufficient to pass the title to Durkee.
>
> "Considered as an action for damages for a breach of the contract, it does state a cause of action, but, as such, it is obnoxious to the objections raised by the special demurrer. It is uncertain as to what the damage consisted of, or as to the extent of the damage."

The judgment was reversed and the cause remanded, with directions to the trial court to sustain the demurrer.

So in the case at bar the contract is one for a staple commodity at its market value, with an alleged trade of a staple commodity in part payment. Repudiation of such a contract leads to no general damages, and if

there are any special damages they have not been pleaded. The demurrer was well taken and it was error to overrule it.

The Court Erred in Not Sustaining the Motion for Non-suit at Close of Plaintiff's Case.

Upon the conclusion of plaintiff's case, we moved [Tr. p. 73] for nonsuit and demurred to the evidence on the ground that plaintiff had not proved the essential allegations in its complaint, and on the further ground that it did not appear that the contract alleged was ever executed so as to bind defendant. At the same time we moved to strike out matters read from depositions and exhibits which plaintiff had offered to connect and which the court had admitted in evidence subject to such connection. These motions were made together and are covered by plaintiff's exceptions Nos. 13 and 14. In support of our contention that plaintiff had not proved any case, we invite the court's attention to the evidence [Tr. p. 31 *et seq.*], from which it appears that plaintiff below offered its main testimony by the reading of certain parts of depositions taken in Chicago, which showed merely that one Holland, a broker in Los Angeles, had entered upon certain negotiations leading up to the contract in suit. The question was whether Holland ever had authority to bind the Graver Corporation by his signature to a contract. We suggest that a perusal of the correspondence set out in the exhibits nowhere supports any authority to Holland to sign contracts. The manager of the tank sales department said [Exhibit 6, Tr. p. 33] he would not "enter into any arrangement until we were better known to each other." This letter

was offered to prove agency, and the court, upon our objection, said [Tr. p. 35]: "It will be received for what it is worth. Of course, it is not proof of agency, but it tends in that direction." Later he wrote [Tr. p. 35]: "We informed you some time ago by telegraph that we are not interested in a trade and regret, therefore, to advise that the approval of the contract is not in order. We will be willing to accept the Hercules order only on our regular term basis, involving in no way, however, the Getty tank." The court will note that the contract at bar is here spoken of as "the Hercules supposed contract," and that the defendant offered to entertain not a contract, but an "order," and in the telegrams following, the Graver Corporation continues to refer to the transaction as an order; thus the wire to Getty [Tr. p. 41] directly speaks of an order. The court admitted this wire, although it was irrelevant, "subject to being connected with the transaction." This connection was never made and our motion to strike should be granted.

Plaintiff then introduced Exhibit 79 [Tr. p. 43], which appears to be an order to Holland, supposed to represent Graver. This, also, the court perceived to be irrelevant, and received it only subject "to being connected up." [Tr. p. 44.] Your Honors will note that this order, together with the account [Exhibit A, Tr. p. 45], do not bear upon the contract alleged, but concern a purely collateral deal with Getty.

Plaintiff then sought to show by C. R. Bird, superintendent for plaintiff, that Holland had signed a contract [Tr. p. 62], and had exhibited a letter giving him

authority to sign it on behalf of defendant: "This letter was a long one and I did not see all of it. The gist of the part that I saw was that Holland had full authority to transact any business in Los Angeles on behalf of Graver Corporation, particularly the settlement of the tank deal with Getty." Later, upon cross-examination, he admitted, "It was so far away from me I couldn't read it." [Tr. p. 81.] Plaintiff then called Holland, who testified that he had no such letter; that he did not recall ever seeing any such letter.

Thereupon, H. P. Grimm testified [Tr. p. 59] that he was present and saw a letter "tending to show that he represented the Graver Corporation, and he folded it back and just let us see a part of the letter with a signature on." Upon cross-examination he said he did not recognize the signature.

Andrew Mattei, treasurer for defendant, also testified about Holland's letter of authority. He says [Tr. p. 71]: "Bird and Grimm were skeptical about Holland's authority. He produced a letter with Graver Corporation printed on it at the head, and folded it over and showed the lower portion. The contents of that portion was that Holland had full authority to act for Graver in and around Los Angeles." Upon cross-examination: "We asked for additional evidence of Holland's authority. We went down to the bank to obtain this, but the gentleman at the bank was not in and we never went back—I could not verify the signature of Mr. Graver. I never talked to Mr. Graver about this letter having been shown me and did not ask him if such a letter was authentic."

Plaintiff then introduced certain evidence of value and rested.

We thereupon moved to strike out the evidence which had not been connected as required by the court's order, and demurred to the evidence and moved for nonsuit.

We submit that it was error to refuse this nonsuit if plaintiff had failed to establish any essential averment of his complaint. The most important of these was that plaintiff and defendant entered into an agreement in writing. The agreement proved was executed by Holland, and we submit that there was no competent evidence of Holland's authority. The contract was required to be in writing. "An agreement for the sale of goods, chattels, or things in action, at a price not less than two hundred dollars." C. C. Cal. 1624 and 1739. "The provisions of section seventeen thirty-nine apply to all exchanges in which the value to be given by either party is two hundred dollars or more." (C. C. Cal. 1805.) Therefore, Holland's authority could not be established by parole.

C. C. Cal. 2309:

> "Authority to enter into a contract required by law to be in writing can only be given by an instrument in writing."

Seymour v. Oelrichs, 156 Cal. 782:

> "The whole object of the statute would be frustrated if any substantive portion of the agreement could be established by parole evidence."

If it could be said that the transcript discloses any authority, it was restricted to taking orders and forwarding them, and such an agent cannot bind his principal without acceptance.

> "Where the principal has bestowed a restricted authority, or has openly fixed the limits of the authority, the agent's sales on terms not warranted by the authority do not bind the principal, unless with notice of the agent's acts he approves and accepts them."
>
> 2 C. J. 598.

Even if Holland had been granted authority to sell, it would not support an agreement to purchase a second-hand tank as part of consideration.

> "As a general rule, the sale must be for cash only, and, in the absence of special authority, mere authority to sell does not give the agent authority to sell on credit, and such an agent cannot bind his principal by receiving payment in bonds, notes, or other paper. A sale contemplates a price in money, and hence authority to sell confers power to sell for cash, but not to exchange for other property, or for part property and part cash."
>
> 2 C. J. 599.

We think it evident, then, that plaintiff must prove that Holland had authority in writing, and that that authority either was unlimited or, if it was limited, that it authorized the purchase or acceptance in trade of this second-hand Graver tank for twenty-seven thousand dollars, which Hercules now affirms was only worth twelve thousand dollars. We submit that there was no evidence of written authority and that the attempt to show that such authority had existed at some time did not succeed. We have shown that Holland testified that no such letter had existed, and it appears from the transcript that the testimony of the Gravers was taken

in Chicago, and a great volume of correspondence attached to the depositions. If there is anything in that correspondence which supports plaintiff in error, we ask why such letters were freely given upon deposition, when one other letter has left no trace in anybody's files. We ask Your Honor to scrutinize the testimony of Bird and Grimm, who were "skeptical about Holland's authority," and who now talk about a letter which they saw at a distance, folded in such a way that only the last paragraph could be seen, and signed by someone whose signature they could not recognize. After this incident they were still "skeptical," and went to Holland's bank for information, which they did not get. [Tr. p. 71.]

There was no competent evidence at the close of plaintiff's case to support the allegations:

1. That there was any contract between the parties;

2. That plaintiff had ever produced to defendant "due evidence" or any evidence whatsoever of title to Tank No. 2;

3. That there had been any breach of contract;

4. That plaintiff had suffered any injury.

The Court Erred in Admitting Exhibit 6.

[Tr. p. 32.]

"Exhibit 6.

February 11th, 1924.
(Dictated February 9th)

Mr. S. Reid Holland,
819 Stock Exchange Bldg.,
Los Angeles, California.
A. A. Butler:

In explanation of the various wires that have been sent you, I beg to give you the following explanation:

Before proceeding I wish to advise that this matter has been analyzed in detail to Mr. P. S. Graver personally, who stated that he advised you that any arrangement he made with you personally while on his trip to your city was subject to detailed arrangements that would be made with you by the sales department at this end. It was my intention some time ago to write up a contract under which you were to operate, but did not feel, in view of the short space of time that we were known to each other, that we should enter into any arrangement until we were better known to each other, which is one that I have been following out in all of my sales plans.

Regarding the Getty proposition; as explained in Mr. Phillips' wire of late January, we had at no time based our figures on any other plans, but that $580.00 per tank was the commission and that $750.00 per tank was your split on the erection. In view of that fact, therefore, as advised in that wire, your account had been credited with the amount of $580.00 on the first tank, plus the full split on the erection, but in view of the fact that only $18,000.00 had been received on the second tank only one-half of the commission should have been credited to your account. As mentioned in Mr. Phillips' wire, a sum in excess of this had already been credited and we, therefore, did not see the justice in your request asking for additional commissions.

As stated in Mr. P. S. Graver's wire of several days ago and in my night letter of yesterday, further commissions will, therefore, not be paid on the Getty account until the check for $9000.00, which you advised under date of January 30th would be sent us last week and which in a more recent wire you stated would be sent us this week, is received. Upon receipt of this check the balance of the commission due you will be sent, and upon receipt of a release from Getty on our contract

and a release from Abbott on the erection we will be willing to forward you our check for the amount due you on the erection.

Regarding that portion of your wire communication which spoke of our sending you balance due Abbott on the first Getty tank, wish to advise that it is our policy to make payments until releases are in our hands. We must either have Getty's acceptance of the first tank, or his release of us from the balance of the erection of test before this amount can be paid.

Your last wire requests that we honor your draft for 60% of the draft that we had recently made on the Western Refinery proposition. As previously advised, paying commissions by drafts is not an acceptable procedure and must be discontinued. I, therefore, advised you that when we received notification from our bank that the moneys covering our draft is in their hands check covering the commissions due will be sent you.

I don't want you to feel for a minute that I am taking an arbitrary stand in this matter. All of our agents are handled in a like manner, and in view of the fact that we have been universally successful in our arrangements with them I can see no reason whatsoever why the same sort of an agreement should not be acceptable and work satisfactorily in your case.

Yours very truly,

Manager Tank Sales.

Mr. McComb: We are offering that letter for that statement, to show that there was an agency.

Mr. Bassett: To which we object on the ground it is equivocal and remote; that it doesn't tend to show that this man has been treated, will be treated, or ever has been treated, as an agent, or, if he was, whether it

was a general agency, a special agency, a mere authority to send in offers, or what it is. This court certainly will not gamble upon an equivocal statement of that sort, which is merely a part of a letter, which says, 'We have treated our agents in a certain way.'

The Court: The objection is overruled, and it will be received for what it is worth. Of course, it is not proof of agency, but it tends in that direction."

This ruling is typical of the fragmentary and border-line character of plaintiff's evidence. The purpose of the offer was "to show that there was an agency." The letter expressly refuses to "enter into any arrangement until we are better known to each other." The letter was offered as proof of agency and the court, holding it was not such proof, was in error in admitting it.

The Court Erred in Admitting Exhibits 102 and 103.

[Tr. p. 41.]

"Exhibit 102.
Graver Corporation
East Chicago, Indiana
August 24th, 1923.

Confirmation of Telegram
To Thompson Holland Co.,
820 Stock Exchange Bldg.,
Los Angeles, California.

Our damage five thousand yours to be added in view of possibility of securing additional business from Getty we are not inclined to take advantage of this situation and would recommend leniency on your part also.

Graver Corporation.

EXHIBIT 103.

Graver Corporation
East Chicago, Indiana

Confirmation of telegram August 25th, 1923.

To Geo. F. Getty,
536 Union Oil Bldg.,
Los Angeles, California.

Wired Thompson Holland night letter advising extent of damage if your order is cancelled please handle settlement thru them.

GRAVER CORPORATION.

The Court: It (Exhibit 103) will be received in the same way, subject to being connected with the transaction.

Mr. Bassett: To which we object on the ground that George F. Getty, to whom this wire was sent, is not a party to this action, nor is there any element in the issues in this case concerned with George F. Getty, and that it is incompetent, irrelevant and immaterial. Here is a wire to another person outside of this case.

The Court: It will be received subject to being connected with the transaction.

To which ruling defendant duly excepted."

These telegrams were not addressed to plaintiff, nor can they be said by the remotest inference to confer power to bind Graver by written contract. That was the purpose for which they were offered, and the trial court observed that they had no connection with the transaction, and received them only subject to such connection, which was never made.

The Court Erred in Overruling Defendant's Objection to Exhibit No. 79 as Irrelevant.

[Tr. p. 43.]

"EXHIBIT 79.

Office Order

7/27/23

S. Reid Holland
820 Stock Exchange—Los Angeles, Calif.
Representing—
Graver Corp.
East Chicago, Ind.

Deliver to George F. Getty

Destination to be given later via Santa Fe.

Freight paid to destination by you; we to pay hauling charge from railroad to base.

2 80,000 Bbl—All Steel
Tanks—Gas tight 36,000.00 each

18,000.00 to be paid on completion of tanks and satisfactory tests have been made.

Erected on our property complete for 36,000.00 each, me to make grade and painting to be extra and me to furnish water for listing.

Bal. of 18,000.00 when oil is sold, time not to exceed 1 year.

Interest at 7%.

Tanks to be shipped from Chicago in from 7 to 10 days from receipt of order at *Each* Chicago.

(signed) GEORGE F. GETTY
by H. B. Gordon
Order No. 1323.

To which offer defendant objected upon the ground that it was irrelevant and merely an order, which objection was overruled.

The Court: It will be received subject to being connected up."

This exhibit set out in detail an office order from one Getty, who was not a party, addressed to Holland, described as representing "Graver Corp.", and we submit that the utmost that it showed is that at some time plaintiff in error had received through Holland a certain order from a third party. This order might have been submitted to any solicitor, but cannot have the least tendency to show that Holland had at that time any authority in writing to bind Graver by written contract. This is the purpose for which it was offered and it tended to prove quite the opposite, to-wit, that he was a mere vehicle. The trial court observed that it had no connection with the case and should have sustained the objection.

The Court Erred in Admitting Exhibit "A".

[Tr. p. 45.]

This exhibit was unsupported and unsigned, being a mass of dates and figures referred to as being "Defendant's Exhibit A." The court will note that this was offered by plaintiff and is not an exhibit for defendant; that it is said to have been attached to a deposition, but this part of the deposition was offered by the plaintiff below out of a mass of office files attached to the deposition. Plaintiff below having offered this part of the deposition of Graver, he is their witness, and not ours. (C. C. P. Cal. 2022; Wigmore on Evidence, Sec. 912.) The evidence offered was without connection, support or relevance, and the objection should have been sustained.

The Court Erred in Overruling Objection to Admission of Exhibit No. 10.

[Tr. p. 49.]

"Exhibit No. 10.

February 21, 1924.

Mr. S. Reid Holland,
820 Stock Exchange Building,
Los Angeles, California.
Dear Sir:

A nine thousand dollar check from George F. Getty, accompanied by your draft for eight hundred and eighty-six dollars and thirty cents, the balance commission due you on this account, received by our bank today.

We are not very well pleased with the way you have handled this item. Evidently you do not realize the various conditions attached to this contract. In the first place, the two tanks were sold to Getty based on half cash, balance within one year's time, and on my visit out there an amended contract was drawn up by myself, which Getty was to sign, and this provided the detail very clearly so that there would be no controversy over the contract when the provisions were lived up to.

After the first tank was finished and Getty did not desire to go ahead with the second tank, this left Abbott having a claim against our company for an adjustment on the erected price of the two tanks. It also left Getty with a claim on us in case of the first tank leaking to make it good. This is the reason we do not want to pay Abbott the entire amount for the first tank, as he has spent no money for testing the tank, and he should not receive the balance until the tank was tested and accepted or Getty released us from all claims and paid us the balance due us. You made a number of promises, that Getty would mail the amended contract to us, and

later a check would be mailed to us; not having received either, we were in no position to pay you the balance of your commission or to make any final advances to Abbott.

We wired you very clearly that on Getty's payment for the balance and a release from he and Abbott, we would send you your commission. We would not accept any drafts from you on this account. It seems that you were premature in drawing on us for this commission, this based purely on Getty's promise that he was going to give us a check.

Getty's check received today states on same 'Account tanks in full.' While this does not clearly define that he has no claim upon us, we believe we can accept it as closing his side of the contract. There remains now only Abbott to be settled with, and if Abbott will sign the release which Butler sent you, we will either mail him a check or let him draw on us for the balance.

Our stand in this matter may have looked arbitrary to you, but where a company like Getty, that has made so many promises, we have got to see the money before we are willing to pay out other money on account.

You had no right to tie our check from Getty up with your draft, as this check was the property of the Graver Corporation, and any time you feel that you cannot depend on what we tell you we agree to do, that is the time to quit doing business with our company. For your guidance in the future we will pay no commissions by sight draft. Whatever percentage of the total contract the customer pays on account, this will be your percentage against your total commission. Also, all customers' accounts are to be paid direct to us by the customer. This is our regular rule that is followed by all of our men. We have had entirely too much controversy

over these matters, and we have got to get down to business basis regarding these things.

Yours very truly,

GRAVER CORPORATION
Vice President.

The introduction of this was duly objected to upon the ground that it was incompetent, irrelevant and immaterial, and the objection overruled, to which defendant excepted."

This is a letter from Graver to Holland concerning a prior deal with Getty. It has no relation to the contract referred to. We assume that it was offered for the purpose of showing written authority to Holland to sign a contract with Hercules. This is the *sine qua non* for plaintiff's case, and we submit that this letter was utterly incompetent for this purpose, or for the purpose of proving any issue in this case. It is merely a desperate attempt of plaintiff to raise inferences of authority by showing that Graver knew Holland and had received orders solicited by him. Unless Your Honors think that this letter was sufficient authority in writing for the execution by Holland of the contract at bar with Hercules, under the doctrine of C. C. Cal. 2309 and Seymour v. Oelrichs, 156 Cal. 782, you will find that the admission of this evidence over our objection was error.

The Court Erred in Admitting Exhibit 11.

[Tr. p. 53.]

"Exhibit No. 11.

Western Union Telegram.

Los Angeles, Calif., Feb. 22, 1924.

Graver Corp.
East Chicago, Ind.

Demurrage at Wilmington goes to five dollars per car Monday stop understand from Florian that additional contracts have been forwarded why not come to California and thaw out Phil stop Gilmore tanks very unsatisfactory Kinghorne has recaulked every seam one tank and third test now being made on other one which has had bottom this kind of work is poor support for sales likewise delay on quotations Rush Hercules estimate stop was elected director yesterday mercury refinery which enables me to better protect our White Star interests.

S. Reid Holland.

To which offer of Exhibit No. 11 defendant objected on the ground that the same was incompetent and immaterial.

The court admitted this evidence subject to being connected up; to which ruling defendant duly excepted."

This is a telegram from Holland to Graver, and we suggest that it is on the same footing with the prior attempt to show Holland's authority. There is no issue in the case to which it is pertinent, and the trial court recognizing that it had no connection with the case, admitted it "subject to being connected up." This was never done and upon the face of the telegram could not be done.

The Court Erred in Admitting Exhibit 38.

[Tr. p. 54.]

"EXHIBIT NO. 38.
Graver Corporation

To Graver Corp., March 14th, 1924.
Attention P. S. Graver, Vice-Pres.
Address East Chicago, Ind. File No. #102
From S. Reid Holland Geo. F. Getty Co.
Dear Sir:

Without reviewing too much detail, the contract which you revised and left with Mr. Paul J. Getty was followed up consistently and often by yours truly and I made some fifty-seven trips and then some to the Getty office in an effort to have this matter closed, but the general circumstances surrounding affairs and principally Mr. Getty's illness and the fact that the organization became internally disorganized resulted in a general buck passing contest. The situation has somewhat cleared itself and as I stated in a recent letter the Getty affairs are being incorporated as the George F. Getty Company with the senior as president and the son, Paul Getty, vice president and general manager. Various resignations have taken place and Paul Getty has hopes of making a good organization out of what is left. He was criticised pretty generally for buying the 80s altho as a matter of fact he voluntarily admits if he had bought the 10 when we first talked of them and filled them with cheap oil, that was then available, they would have paid for themselves long ago and he would have been way ahead, however that opportunity is passed.

Tank #2 stands an empty monument and they have nether oil nor water to even test it and there was little likelihood of their having any need for Tank #2 as their drilling campaign in Torrance constituting some ten or twelve wells has not panned out as yet and there was

every possibility of their standing us *oof* indefinitely, that is, unless we wanted to force settlement on Tank #2.

The Hercules Gasoline Company which is quite an active and growing concern needed production and a proposition was worked out early in February whereby Getty was to furnish them crude along certain favorable lines for a period of five years and in consideration for the favorable price, Hercules agreed and did purchase tank #2 and at this writing it is their property. I agreed with Getty as per the enclosed contract that I would help him clear the decks and get out without loss which he naturally appreciates, and you will note that there is no mention of any subsequent test on tank #1. In fact, the question did not come up, but I am still holding Abbotts check which was sent to me awaiting a letter which he is preparing guaranteeing to make good any leaks that we may be called upon to take care of. This is only a precaution on my part to take care of future contingencies. I have been obliged to hold out on you apparently on this transaction principally for the reason that Bird of a Hercules Company has changed his specifications several times and at the outset he did not want the equivalent in tonnage until sometime in July. You will note from the details which I am enclosing you in another letter on the Hercules transaction that there is ample margin for me to protect you against loss in disposing of Tank #2. I had in mind utilizing it on the Western job which I will write about in another letter, and had the diameters change on the 55's for that particular reason.

If this Hercules transaction meets with your approval, I will work out a disposition of tank #2 that will be satisfactory.

At this writing the Western contract has been partially disposed of. Two of the 55's were let yesterday to the

Western Pipe and Steel Co., and the other four will be refigured as I will explain in another letter.

In addition to this possibility of turning tank #2 promptly, and in connection with my letter of this date relative to White Star, if agreeable to you I would like to utilize Getty Tank #2 as a complete tank for #3 on the White Star job providing, however, that they will take care of the payments on Tank #2 as indicated in my letter of this date and be in a position to take care of the obligations on Tank #3, which would obviate the necessity of shipping any more steel from Chicago right away but would give them the tank #3 within the next sixty days. In either event, Getty will handle the transportation of tank #2. Please bear in mind that in endeavoring to work out this solution I had in mind the final settlement for you on the Getty account and I feel that the transaction with the Hercules Company will be a good one for us, as they are going to need considerably more equipment and storage. At this writing I am waiting your final figures and will probably write you during the day giving you all the facts relative to the Hercules matter.

I trust I have made myself clear and that this meets with your approval.

Yours very truly,

(Signed) S. Reid Holland."

To the introduction of which defendant objected upon the ground that the same was incompetent, irrelevant and immaterial. The objection was overruled. Defendant duly excepted.

This is a letter from Holland to Graver and could not, therefore, under any circumstances operate as proof of written authority from Graver to Holland. We think it clear that nothing short of written authority satisfies

the statute of frauds. The agent's writing was incompetent to prove anything, and our objection should have been sustained.

The Court Erred in Admitting Those Portions of Exhibits 16, 37, 39, 138, 139, 142, 144, Which Showed the Head of Certain Office Stationery.

[Tr. p. 58.]

Plaintiff here offered Defendant's Exhibits 16, 37, 38, 39, 138, 139, 142 and 144, as to that portion of those exhibits which contained on the stationery of S. Reid Holland the following: "Graver Corporation, inter office correspondence, Date, File No. To, Address, From." To which evidence the defendant objected on the ground the same is incompetent, irrelevant and immaterial. The objection was overruled and the evidence admitted subject to being connected, to which ruling defendant duly excepted.

Plaintiff below being unable to show any written authority to Holland to sign contracts on behalf of Graver Corporation, sought to raise an inference of such authority by showing that certain stationery which Holland had used had written upon it "Graver Corporation, Inter-office Correspondence, Date, File No. 2, Address, From." We submit that at the utmost this can only show that Holland assumed whatever relation these words signified. Nothing that he could do could make him Graver's agent as against the statute of frauds, nor could Graver by any means be estopped by claims or assertions made by Holland. The trial court clearly recognized that the testimony was irrelevant and incom-

petent, and admitted it only "subject to being connected." We think the ruling was error and we point out that our subsequent motion to strike should have been granted.

The Court Erred in Overruling Objection to the Question, "Did You Have Any Conversation With Mr. Holland Regarding His Authority to Represent the Graver Corporation?"

[Tr. p. 61.]

We have always considered it elementary that an agent may not establish his own authority.

Ferris v. Baker, 127 Cal. 520:

> "We leave out of view any declarations of E. N. Baker as to his agency for his wife; they were incompetent to establish the fact of agency against her."
>
> "Agency cannot be proved by the declarations of the agent."
>
> Patterson v. Stockton and Tuolumne Railroad Company, 134 Cal. 244.

People v. Dye, 25 Cal. 108:

> "The fact, therefor, which was sought to be shown was not proper for the consideration of the jury; but if it had been, the mode of showing it was improper. It consisted in proving that at the time she demanded the money Mrs. Dye said that her husband had sent her to do so. There was no other evidence of the fact beyond such declaration. But any rogue may use the name of an honest man to facilitate his roguery. It is well settled that the mere declaration of the alleged agent is not evidence of the agency."

We submit that no conversation with Holland regarding his authority could be admissible to prove that authority as against the requirements of the statute that such authority be in writing. The question was clearly incompetent and the objection should have been sustained.

The Court Erred in Refusing to Strike Out Evidence of Bird Concerning an Alleged Letter From Graver to Holland.

[Tr. p. 66.]

Holland being called by plaintiff, testified: "I am the Holland referred to in these agreements. I do not have the letter that Mr. Bird refers to and never did have it. I have looked every place where I ordinarily place letters and do not recall ever seeing any letter of that description." Whereupon the plaintiff renewed its objections to any evidence regarding said letter and moved to strike out evidence regarding the same. This objection was overruled and motion denied, and defendant excepted.

We have shown in the prior exception that Bird, who was superintendent for Hercules, was asked if he had any conversation with Holland regarding his authority and was allowed over our objection to testify as follows:

"In the course of this conversation Mr. Mattei brought up the question as to whether Holland had authority to act for Graver, and he produced a letter written on Graver letterhead, signed 'Graver Corporation by W. F. Graver.' This letter was a long one and I did not see all of it. The gist of the part that I saw was that Holland had full authority to transact any business in Los

Angeles on behalf of Graver Corporation, particularly the settlement of the tank deal with Getty." [Tr. p. 61.]

Your Honors will note that at this time, in the midst of Bird's testimony, he was excused from the stand and Holland put on in a vain effort to establish this supposed letter. It is perfectly evident that parole evidence concerning this letter was not admissible under our practice. This is not a case where notice to produce would authorize secondary proof, because Holland was not an adverse party.

C. C. Cal. 1938:

> "If the writing be in the custody of an adverse party, he must first have reasonable notice to produce it."

The only manner in which this letter could be proved by secondary evidence was by first making proof of its loss, and then proving its due execution, together with a copy or a recital of its contents.

> "The original writing must be produced and proved—if it has been lost, proof of the loss must first be made before evidence may be given of its contents. Upon such proof being made, together with proof of the due execution of the writing, its contents may be proved by a copy or by recital of its contents in some authentic document, or by the recollection of a witness, as provided in section 1855."
>
> C. C. P. Cal. 1937.

We submit that none of these elements appear. In other words, there was no proof of loss; no proof of due execution; no offer of any copy; no recital of contents

in any authentic document; and no recollection of any witness who had seen more than a part of this supposed letter.

Byrne v. Byrne, 113 Cal. 291.

In this case the trial court allowed a witness to testify her conclusion as to the contents of a letter. The court said:

> "The admission of this evidence was palpable error. The witness is asked both by court and counsel to testify to the contents of a letter without any foundation of proof of loss for the introduction of such secondary evidence. Moreover, her answers themselves do not fairly state the contents, but, under leading questions from her counsel, she was permitted to give her own judgments and conclusions as to the meaning of the contents of the letter."

Agency in law is not a matter of words, but a legal conclusion from the authority conferred. It is for the court and not for a witness to determine whether any secondary evidence tends to show agency. Bird did not tell the court the contents of any part of the letter, nor did he even see the entire letter, but undertakes to say that "The gist of the part that I saw was that Holland had full authority." We submit that this was purely a conclusion of the witness and did not tend in any respect to establish the document as authority from Graver to Holland. But quite as serious objection can be raised to the failure to prove the signature of Graver. There is nothing to show that the witness knew the signature of Graver or that he recognized or identified it. He admits he did not know the signature. [Tr. p. 70.]

"I never saw any of the Gravers; I don't know that I ever saw any of their signatures except on a contract between Paul Getty and the Graver Corporation. This letter I refer to was signed by Graver, but I do not recognize the signature. The name of Graver appeared there, that is all."

But even if he had established the signature, he should not have been allowed to testify to the effect of a writing only part of which he had seen.

> "By the principle of completeness it is regarded as unsafe to listen to any testimony of the contents of a lost writing unless that testimony purports to reproduce at least the substance of the contents, and some courts even require the fairly complete detail of its contents."
>
> Wigmore on Evidence, Sec. 1957.

The Court Erred in Admitting Testimony of Grimm to a Conversation Between Bird and Holland as to Holland's Authority.

[Tr. p. 69.]

Question: "Did you hear a discussion between Mr. Bird and Mr. Holland as to Holland's authority to sign these contracts?"

Answer: "Yes, sir."

Question: "What was said?"

This was objected to as incompetent, irrelevant and immaterial, and the objection overruled. This ruling is on the same footing with the ruling in regard to the testimony of Holland on the same (*supra*), and we renew the objections stated above to the admission of any statements of Holland as to the existence or extent of his authority.

The Court Erred in Refusing to Strike Out the Testimony of Grimm That a Letter Had Been Shown Him by Holland "Tending to Show Holland Had Authority to Act for Graver Corporation."

[Tr. p. 69.]

This is the answer to the question set out in the foregoing exception and permitted over our objection.

The witness says:

"Bird questioned Holland as to whether he had authority to act for the Graver Corporation. Holland said several times that he did, and said he had a letter and he showed us a letter from Graver Corporation on their stationery, signed by one of the Gravers, tending to show Holland had authority to act for the Graver Corporation." [Tr. p. 69.]

Testimony as to the contents of this letter was objected to on the ground that same was incompetent, irrelevant and immaterial, and without foundation, and the exception overruled.

We submit that the statement of what the letter tends to show is purely a conclusion, and that the witness was permited to usurp the province of the court, as this answer was purely a conclusion of law. The witness did not pretend to know the signature to the letter, nor to whom it was addressed, nor the contents, yet the trial court permitted him to state his conclusion of law as to its effect. We submit that the ruling was palpable error.

It is immaterial what part of an averment may say, as it must be taken as a whole or not at all.

The Court Erred in Refusing at the Close of Plaintiff's Case to Strike Out Testimony Received Conditionally, Subject to Being Connected or a Foundation Laid.

[Tr. p. 93.]

We recall that plaintiff was endeavoring to establish written authority authorizing Holland to act for Graver. For this purpose they offered various letters and conversations, none of which purported to constitute such authority. The trial court evidently thought they were suffering from some sort of impediment and would in the course of time come to the point. He adopted a benign and not unheard-of practice of admitting the testimony tentatively, subject to a later showing that it had something to do with the case. For example, the letter of February 11, Exhibit 6 [Tr. p. 32]:

"Mr. McComb: We are offering that letter for that statement, to show that there was an agency.

Mr. Bassett: To which we object on the ground it is equivocal and remote; that it doesn't tend to show that this man has been treated, will be treated, or ever has been treated, as an agent, or, if he was, whether it was a general agency, a special agency, a mere authority to send in offers, or what it is. This court certainly will not gamble upon an equivocal statement of that sort, which is merely a part of a letter which says, 'We have treated our agents in a certain way.'

The Court: The objection is overruled, and it will be received for what it is worth. Of course it is not proof of agency, but it tends in that direction."

To which ruling defendant duly excepted.

Later the telegram, Exhibit 103 [Tr. p. 41], was received in the same way, "subject to being connected with the transaction."

Again, when the office order [Tr. p. 43] was offered, the court received it "subject to being connected up."

Exhibit No. 11 [Tr. p. 53] was admitted "subject to being connected up," and, indeed, all of the evidence of plaintiff regarding letters and conversations concerning the agency were incompetent and irrelevant, and were admitted by the court in the hope that before the close of plaintiff's case he would show their foundation and connection with the issues. We submit that this showing never was made; that there was no pretense or testimony of any witness to any original or secondary evidence establishing that defendant below had ever executed any written authority to Holland to execute the contracts sued upon. The testimony having been admitted subject to connection, and connection not having been made, motion should have been granted, and its denial was reversible error.

There Is No Evidence to Support the Finding of the Court That Plaintiff and Defendant Entered Into a Certain Agreement in Writing.

[Tr. p. 23.]

We have already shown that plaintiff did not establish any authority in Holland prior to the motion for nonsuit. We submit that no evidence was ever subsequently submitted to show any such authority. Bird was again called in the rebuttal and said in regard to the supposed letter of authority:

"It was so far away from me I couldn't read it, but that portion I did see was the last paragraph. It seemed to be a business letter signed 'Graver Corporation by W. F. Graver.' The Graver Corporation name was typewritten. I don't remember the wording, but the gist of it was that Holland was their authorized agent. I never asked to see the letter again and I don't know to whom it was addressed or the date of it." [Tr. p. 81.]

Grimm was also recalled in rebuttal and said:

"Mr. Bird questioned Holland about his authority to act for Graver and Holland made some remark, 'Let them go over to the bank to satisfy them.' "

We recall here that Grimm and Bird went to the bank, but found nothing. We submit that there was no competent evidence on which the court could find that Holland had written authority from Graver to sign the Hercules contract, and without such proof the finding must fail.

There Was No Evidence to Support Finding III That Plaintiff Had Theretofore Produced Due Evidence of Its Having Acquired Title to Said Graver Tank No. 2.

[Tr. p. 24.]

We respectfully suggest that the finding is informal in that it does not find that such was the fact, but if it was intended to be a finding that plaintiff had produced such evidence, there was no competent testimony to support it. The only testimony on the subject is the conclusion of Bird that Holland "saw the bill of sale which was handed to us." We submit that even if Holland had seen a paper handed to Bird, this is not competent

evidence to show that it was a bill of sale or that it conveyed title. Moreover, even if Holland had known that it was a bill of sale in the hands of Bird, there is no proof of production of "due evidence" to the Graver Corporation or even to Holland. The finding is without support and was an essential condition of the contract.

The Evidence Does Not Support Finding IV "That It Is Not True That Said Holland Executed Said Agreement Without Authority of Defendant, or That Said Holland at Said Date Did Not Have Authority or Right to Execute Said Agreement for or on Behalf of Defendant, or That Defendant Never at Any Time Ratified or Confirmed the Same."

[Tr. p. 25.]

This is the same question argued above. The court does not find that there was written authority, as put on issue by the answer, which we have shown is essential under the statute of frauds. We would suggest, also, that there is no evidence to support any ratification or adoption, which also is required to be in writing. C. C. 2310:

> "A ratification can be made only in the manner that would have been ncessary to confer the original authority to the act ratified."
>
> Cook v. Newmark Grain Company, 54 Cal. App. 283.

Plaintiff below tried to foist upon Holland a $12,000 tank for $27,000. When Graver refused to take second-

hand goods in trade or to accept any contract made by Holland or anything other than an order subject to acceptance, the disappointed Hercules Gasoline Company sought to realize upon the mythical valuation set upon their tank and force Graver to swallow the Holland contract. We submit that the trial court erred in every respect above set out and the judgment should be set aside and the cause remanded with instructions to sustain the demurrer.

Respectfully submitted,

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